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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Southern Counties Oil Company,

10 Plaintiff,

11 v.

12 Lucas Henry, et al.,

13 Defendants.
14

No. CV-18-02307-PHX-DWL

ORDER

15 Pending before the Court is the parties' seventh stipulation to extend deadlines.
16 (Doc. 137.) As explained below, the Court requires more information before deciding
17 whether to grant the stipulation.

18 **BACKGROUND**

19 On July 23, 2018, Plaintiff filed the complaint. (Doc. 1.)

20 On October 31, 2018, the undersigned judge inherited this case. (Doc. 42.)

21 On December 17, 2018, the Court issued a scheduling order, setting various
22 deadlines including a November 1, 2019 deadline for fact and expert discovery and a
23 December 20, 2019 deadline for dispositive motions. (Doc. 51.) The order emphasized
24 that "the Court intends to enforce the deadlines set forth in this Order, and the parties should
25 plan their litigation activities accordingly." (*Id.* at 7.)

26 The Court has since extended the deadlines, at the parties' requests, six times.
27 (Docs. 64, 78, 96, 122, 130, 132.) The last time was on June 10, 2021, at which point the
28 Court included and emphasized an express warning to the parties: "**No further extensions**

1 **will be granted.**” (Doc. 132.)

2 The Court’s June 10, 2021 order extended the discovery deadline to November 1,
3 2021 and the dispositive motions deadline to November 29, 2021. (*Id.*) The extended
4 discovery deadline—which was exactly two years later than the original discovery deadline
5 and just shy of three years from the start of discovery—allowed the parties over four and a
6 half additional months to conclude discovery.

7 Nevertheless, despite having been warned that no further extensions would be
8 granted, the parties scheduled three fact witness depositions for the week before the
9 discovery deadline, such that if the depositions had to be canceled for any reason—a not-
10 uncommon occurrence—there would be no way to conclude discovery by the Court’s six-
11 times-extended and final deadline. (Doc. 137 at 3.)

12 On October 20, 2021, one of Plaintiff’s attorneys, Philip K. Lem, learned that his
13 daughter’s third grade class was exposed to Covid-19. (*Id.*) The following day, Mr. Lem’s
14 daughter took a Covid-19 test, and on October 22, 2021, she received a positive result.
15 (*Id.*) Following CDC guidance, Plaintiff needed to isolate due to his daughter’s positive
16 test result. (*Id.*) Because it was “Defendant’s preference that the scheduled depositions
17 take place in person,” the parties cancelled the depositions. (*Id.*) They then waited several
18 more days, until the day of the fact discovery deadline, to inform the Court of the parties’
19 decision to cancel the eleventh-hour depositions (rather than trying to find some way to
20 make them happen) and to request an additional 90-day extension for all pending deadlines.
21 (Doc. 137.)

22 **DISCUSSION**

23 The Court is responsible for securing “the just, speedy, and inexpensive
24 determination of every action and proceeding.” Fed. R. Civ. P. 1. To that end, the Court
25 must, “as soon as practicable” at the dawn of every litigation, issue a scheduling order,
26 which “must limit the time to . . . complete discovery, and file motions.” Fed. R. Civ. P.
27 16(b)(2)-(3). Pursuant to Rule 16(b)(4), the Court’s “schedule may be modified only for
28 good cause” and with the Court’s consent. “Rule 16(b)’s ‘good cause’ standard primarily

1 considers the diligence” of the party or parties seeking to modify the scheduling order.
2 *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir. 1992). “The district
3 court may modify the pretrial schedule ‘if it cannot reasonably be met despite the diligence
4 of the party seeking the extension.’” *Id.* “If that party was not diligent, the inquiry should
5 end.” *Id.* “[A]s a practical matter, extraordinary circumstances is a close correlate of good
6 cause” and is “not intended to be a less rigorous standard than good cause.” *Id.* at 610.

7 The parties assert that “good cause exists to extend pending deadlines by 90 days”
8 due to what the parties characterize as “extraordinary circumstances.” (*Id.* at 2.) The Court
9 is not so sure. At this point, nineteen months into the pandemic, isolating due to Covid-19
10 exposure has become commonplace and is but one of the many mundane logistical reasons
11 why a deposition might need to be rescheduled or conducted by different means or by
12 different attorneys. Because the parties scheduled the depositions for the week before the
13 deadline—thereby putting themselves in a situation in which the depositions could not be
14 rescheduled before the final deadline—the parties should have found a way to ensure the
15 depositions were not cancelled. The depositions could have been conducted remotely via
16 videoconferencing, which has become increasingly common during the pandemic. *United*
17 *States for use & benefit of Chen v. K.O.O. Constr., Inc.*, 445 F. Supp. 3d 1055, 1057 (S.D.
18 Cal. 2020) (“While the Court is sympathetic to the challenges to the legal community
19 during this pandemic, attorneys and litigants are adapting to new ways to practice law,
20 including preparing for and conducting depositions remotely. In addition to finding no
21 good cause to extend fact discovery for sixty days, the Court also finds the parties have not
22 diligently sought to complete depositions because they are rejecting the use of remote
23 videoconference depositions for reasons of convenience and not true prejudice.”). It is not
24 clear to the Court that “Defendants’ preference that the scheduled depositions take place in
25 person” (Doc. 137 at 3) was a good enough reason for the parties to disregard the urgency
26 of completing the depositions before the deadline, particularly where no explanation has
27 been provided for that preference. Alternatively, even assuming the depositions needed to
28 be conducted in person for some unspecified reason, the parties have not explained why

1 another of Plaintiff's three attorneys could have conducted them. At the very least, if the
2 parties could not troubleshoot this emergency of their own making, the parties could have
3 brought the issue to the Court's attention when Mr. Lem learned he would have to isolate,
4 before cancelling the depositions, instead of cancelling the depositions and waiting until
5 the discovery period elapsed before seeking an extension.

6 Even if the circumstances were truly "extraordinary," this situation could have
7 easily been avoided by scheduling all depositions by early October, to allow time for them
8 to be rescheduled if necessary. *Mori v. Baroni*, 2008 WL 2509143, *3 (E.D. Cal. 2008)
9 ("Plaintiffs' lack of prior planning is not this court's emergency."). This approach raises
10 an inference that the parties failed to "plan their litigation activities" in a manner that
11 ensured compliance with the deadlines. (Doc. 51.)

12 The Court further notes that Plaintiff has not made any effort to demonstrate the
13 importance of the three remaining depositions. *United States v. Cathcart*, 2009 WL
14 1817006, *2 (N.D. Cal. 2009) (parties failed to "persuasively demonstrate that the
15 deposition testimony is necessary to support their dispositive motion(s)").

16 The parties appear to have simply assumed the extension would be granted, despite
17 the Court's express warning that no further extensions would be granted. This assumption
18 was unfortunate. *Jimenez v. Montgomery*, 2016 WL 4060099, *1 (C.D. Cal. 2016)
19 ("[R]espondent should not have assumed, as he apparently did, that the Court would grant
20 the extension."); *Spears v. City of Indianapolis*, 74 F.3d 153, 158 (7th Cir. 1996) ("If the
21 court allows litigants to continually ignore deadlines and seek neverending extensions
22 without consequence, soon the court's scheduling orders would become meaningless.");
23 *see also In re Benham*, 2013 WL 3872185, *10 (C.D. Cal. 2013) ("Multiple requests to
24 extend the same deadline are generally disfavored.").

25 Because the parties have not been diligent, "the inquiry should end." *Johnson*, 975
26 F.2d at 609. However, the practical result of denying this stipulation would be that Plaintiff
27 would not have the opportunity to complete three depositions, and the Court is concerned
28 that perhaps Plaintiff was forced to schedule the depositions so close to the deadline

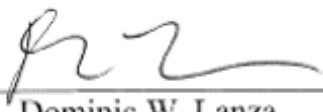
1 because the deponents would not make themselves available at an earlier date, and then the
 2 depositions were cancelled because Defendants were being inflexible and refusing to
 3 conduct the depositions via videoconferencing.¹ If this were the case, Plaintiff should have
 4 *immediately* brought this to the Court's attention—*before* the depositions were cancelled.
 5 Nevertheless, the Court does not want Plaintiff to suffer prejudice if Defendants'
 6 inflexibility caused the conflict. Furthermore, although at this point Covid-19 isolation is
 7 not an "extraordinary" circumstance, the Court is sympathetic to an attorney who is forced
 8 to scramble when his third-grader tests positive.

9 Although the parties filed a joint motion, Plaintiff is the party in need of relief and
 10 is, for the purposes of this motion, the party whose diligence is at issue. Thus, the Court
 11 will hold a hearing to determine whether Plaintiff was diligent enough to merit an extension
 12 of time. (The parties are cautioned up front that, in the event an extension is granted, it
 13 will be a shorter extension than the requested 90 days.) At the hearing, the parties should
 14 be prepared to offer (1) a more in-depth explanation of the events precipitating the joint
 15 motion and (2) a proposed solution that will not delay this case three more months.

16 Accordingly,

17 **IT IS ORDERED** that a telephonic hearing on the parties' joint motion for
 18 extension of time (Doc. 137) is set for **November 5, 2021 at 9:00 a.m.** Arizona time.
 19 Counsel are directed to call (866) 390-1828; Access Code: 9667260 five minutes prior to
 20 the scheduled hearing. Counsel are advised that speaker phones, headsets and connection
 21 through the internet are **not** permitted.

22 Dated this 3rd day of November, 2021.

23 
 24 _____
 25 Dominic W. Lanza
 26 United States District Judge

27 _____
 28 ¹ To be clear, the parties' bare-bones stipulation does not suggest that Defendants'
 inflexibility was the cause of the current situation. The Court is simply speculating about
 the existence of potential extenuating circumstances that weren't brought to its attention.